IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.87 OF 2007

The Commissioner of Central Excise, Mumbai-IV, Mumbai, 115, New Central Excise Building, Opp. Churchgate Rly. Station, Mumbai - 400 020. ..Appellant.

V/s.

1) Mr. Hutchison Max Telecom P.Ltd. Hutch House, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013.

2) Shri V.Narayanan, Project Manager, M/s.Hutchison Max Telecom P. Ltd. Hutch House, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai 400 013. ..Respondents.

Mr.R.V.Desai, senior counsel with S.M.Shah, K.R. Chaudhari and Mrs.N.V.Masurkar i/b. H.P.Chaturvedi for appellant.

Mr.Prakash Shah i/b. PDS Legal for respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 9TH AUGUST, 2007.

ORAL JUDGMENT (PER F.I.REBELLO, J.)

The revenue aggrieved by the order of the CESTAT dated 9/9/2005 has preferred this appeal on the following questions of law:-

A) Whether the activity carried on by the respondents amounts to manufacture as covered by definition under section 2(f) of the Central Excise Act, 1944?

B) Whether the tribunal was justified in law in holding that the respondents are only service providers ignoring the definition of manufacturer as provided in section 2(f) of Central Excise Act, 1944 ?

C) Whether the tribunal was justified in holding in law that none of the requirement of section 3 of the Act are fulfilled ?

D) Whether the tribunal was justified in holding in law that the goods in question do not satisfy the test of marketability except relying on the Judgment of the Supreme Court ?

E) Whether the tribunal was justified in law in going into the question of marketability in view of the fact that the goods in question are covered by CHS No.8525 of the Central Excise Tariff 1985 ?

2. A few facts may be set out as under:-

A show cause cum demand notice was issued by the Commissioner of Central Excise calling upon the assessee to show cause to the duty demand with interest and penalty thereon. The assessee filed a reply denying the liability and contended that the goods were not excisable. The Commissioner, after giving opportunity to the respondents, passed an order dated 29/11/2004 confirming the demand of central excise duty as also penalty on the respondents. The respondents aggrieved by the same preferred appeals before the CESTAT and by order dated 9/9/2005 the appeals preferred by the respondents were allowed. CESTAT while allowing the appeals held that the goods manufactured are not freely marketable nor the appellant / respondents manufacturers. The learned Tribunal while allowing the appeals relied on the Judgments of the Supreme Court in the case of **Triveni Engineering & India Ltd. V/s. Commissioner of Central Excise** reported in **2000 (120) E.L.T. 273 (S.C.)** and also **Moti Laminates Pvt. Ltd. V/s. Collector of Central Exc., Ahmedabad** reported in **1995 (76) E.L.T. 241 (S.C.)**. The CESTAT also relied on the board circular No.58/1/2002-CX dated 15/1/2002.

3. On behalf of the appellant, the learned counsel submits that the Judgments relied upon by the

Tribunal are clearly distinguishable and so also the board circular. It is submitted that the transmission towers set up by the respondent amount to manufacture as the said towers is a new product with a distinct name, characteristics and use and is distinct from the components used in the manufacture. This transmission apparatus which is classifiable under Chapter 8525 of the Central Excise Tariff. It is further submitted that the assembling and erection of the transmission apparatus has been done in such a manner, so that it could be dismantled without substantial damage to its components and can be reassembled at site, if required. The Transmission apparatus, it is submitted are capable of being sold or shifted in original form or in the dismantled condition. The transmission apparatus manufactured at site was movable by nature and not permanently fixed to earth. That being so, they are excisable to duty and covered by the Board's order No.58/1/2002-CX dated 15/1/2002.

4. On the other hand, on behalf of the respondents, the learned counsel submits that the goods are not excisable, being immovable property being fastened to the earth and at any rate are not marketable and consequently, the orders of the CESTAT cannot be said to be illegal or contrary to law. The questions as framed, it is submitted, therefore, would

not arise.

5. With the above contentions, let us consider the facts in issue bearing in mind the law. The duty of excise being on production or manufacture which means bringing out a new commodity. Thus it is implicit that such goods must be usable, movable, saleable or marketable. The duty is on manufacture or production but the production or manufacture is carried on for taking such goods to the market for sale. The obvious rationale for levying excise duty linking it with production or manufacture is that the goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for purposes of buying and selling (See Moti Laminates Pvt. Ltd.) (supra). Although the duty of excise is on manufacture or production of the goods but the entire concept of bringing out new commodity , etc. is linked with marketability. To become goods an article must be something which can ordinarily come to the market or brought and sold. Therefore, any goods to attract excise duty must satisfy the test of marketability. To have attributes of excisable goods as understood in the Excise Law, there must be mobility and marketability. As to whether the goods embedded in earth or building would be excisable has to be decided on the touchstone of permanency. If the goods or the chattel was movable

from one place to another in the same position or liable to be dismantled and re-erected at the later place, if it is liable to be shifted and was dismantled or re-erected at a later place, it will be movable property. But if erected permanently without being shifted from place to place, then it would be treated as permanently attached to the earth [see Municipal Corporation of Greater Bombay & Ors. V/s. Indian Oil Corporation Ltd. (1991 Suppl. (2) S.C.C. 18)].

6. The board's order dated 15/1/2002 issued various clarifications as to when goods erected and installed at site would be excisable or non excisable. Clause (v) thereof reads as under:-

> (v) If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled; then the items would not be considered as movable and will, therefore, not be excisable goods;
>
> (vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without

dismantling into its components / parts, the goods would be considered to be movable and thus excisable. The mere fact that the goods, though being capable of being sold of shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported or dismantled condition. Rule 2(a) of the Rules for the interpretation of Central Excise Tariff will be attracted as the guiding factor is capability of being marketed in the original form and not whether it is actually dismantled or not, into components. Each case will therefore have to been decided keeping in view the facts (considering the size and nature of the goods, the existence of appropriate transport by air, water, land for such size, capability of goods to move on self propulsion ships, etc.) to remove and sell the goods as they are, without dismantling into their components. If the goods are incapable of being sold, shifted and the goods would be considered as immovable and therefore not excisable to duty.

7. It is, therefore, clear that the goods must be excisable or that the goods covered having the attributes of excisable goods as understood in Excise Law which includes marketability. The real question, therefore, that arises is whether, the Transmission Apparatus is goods and secondly if even so whether they are marketable. The Commissioner noting the various equipments held that the transmission apparatus meets the test of manufacture. The Commissioner further noted the various equipments installed at the BTS site room.

The following equipments / apparatus were found to be installed in BTS site room.

a) Microwave Antennas

b) Base station controller / Base Trans-receiver station

c) Microwave Terminal.

d) GSM Antennas

e) Power supplement with rechargeable battery back up.

f) Air conditioners.

g) Transmission tower was erected at the top of the building.

h) The tower was fitted with microwave antennas.

i) The BTS/BSC was installed in pre-fabricated building object.

Based on this material the Commissioner held that what emerges is a new commodity. The argument advanced that only "Base station controller / Base trans-receiver station, cell site / Mobile Switching centre" were connected with the transmission and receiption signals and other equipments were not part of the same, the argument was held as not acceptable as without the tower, UPS, Cable trays, AC., etc., the BTS would not be in a position to function as transmitting and receiving apparatus. The contention of the assessee that various equipments installed at site were individual machine was rejected. The Commissioner further held that with the assembly of various equipment installed what emerges is a commodity with a distinct name, identity, character and use; distinct from inputs and classifiable under chapter 8525 of

Central Excise Tariff and the same is distinct and separate from the various equipments which have gone into manufacture of the above transmission apparatus. The argument that after installation of BTS of cell site it becomes immovable properly was rejected. The statement of Narayan in his statement dated 28/1/2004 was partly relied upon to hold it was not immovable property.

8. The Learned Tribunal re-examining the various aspects of what is described as determination of levy of duty of base station, noted that the appellant is engaged in providing Mobile Telecommunication Service (MTS) and is based on global system for mobile communcation (GSM). The infrastructure for GSM is similar to other networks. The Tribunal then set out the various infrastructure required for GSM and noted that GSM Architecture consists of Radio Station Sub Systems (constitution of MS, BTS, & BSCs) which are networked with the operation support subsystem (constitued MSCs) which networked with the Public network. The entire sub systems of BTSs and BSCs or MSCs and the number of constituents would depend on the Geographical area covered by the Cellular Network and there is no fixed designation numbers to constitute a component of transmission apparatus. It is not necessary to set out the other

facts in detail considering the the Tribunal has in extenso set out the facts. The Tribunal relying on para 20 in the case of Triveni Engineering & India Ltd. (supra) on the test of marketability, held that the so called BTS/BSC site erected, installed and commissioned by the contractors of the company cannot be construed as marketable goods manufactured by the appellant since they cannot go to the market as such BTS/BSC site are not marketable. It also held that the test of marketability would also not be satisfied for another reason being, that for the installation of every BTS/BSC, licence from WPC/SACFA a wing of Department of Telecommunications, Government of India has to be obtained which invariably is user specific and site specific, meaning thereby if one wishes to sell the site to another user, it is not permissible under law, as the approval granted by the aforesaid authority for the frequency allocation and the site is for the user only and the purchaser would have to reapply for the license for that site. It cannot be sold / purchased marketed unattended and be equated to marketable goods. BTS/BSC site, therefore, are neither marketable nor capable of being marketed. The learned Tribunal also held that the appellants are not manufacturers and they are engaged in providing cellular mobile services by virtue of a license granted by the Government of India under the provisions of section 4 of the Indian

Telegraph Act, 1885. Thus, their activity is purely service oriented. The Tribunal held that in such circumstances, the activity of installing and commissioning cell site cannot be an activity of either manufacture and no marketable goods arise. For the aforesaid reasons, the appeal was allowed and accordingly, the orders were set aside.

9. It is not necessary for us to answer the issue as to whether the activities is purely service and consequently, the appellants are not manufacturers. We proceed on the footing that what has been assembled and installed is a new commodity having a distinct name from the components from which it was assembled. The question is whether this new commodity is marketable. We have already considered the test of marketability as laid down by the Supreme Court in Triveni Engineering & India Ltd. (supra) and also Moti Laminates Pvt. Ltd. (supra). At this stage, we also note that we proceed on the footing by ignoring the second finding of marketability recorded by the Tribunal namely that BTS/BSC is not marketable as licence is required from the Department of Telecommunication, Government of India. The facts on record would indicate that the equipments erected are embedded in the earth or on a building. The Tribunal noted that revenue does not contest or dispute the fact that whenever BTS/BSC site

has to be relocated, all the equipments like BTS/BSC, Microwave Equipment, batteries, control panels, air conditioners, UPS, tower antennae are required to be dismantled into individual components, then they are to be moved from the existing site and reassembled at new site. This involves damages to certain parts like cable trays, etc. which are embedded/fixed to the Civil structure as also the BTS microwave equipment itself. All the components of the new product cannot be shifted as an illustration the room housing the equipment. This act of dismantling from the permanent site would render such goods not marketable. Apart from that the goods cannot be re-erected as in the previous place as the requirement of each place is different. Further, from the statement of Narayan as set out in the order of the Commissioner, it may be noted that he had stated that regarding installation of BTS the designing team after survey identified the location as per the requirements of the local coverage needs, determining the shelter location, fabrication of I-beam and pole location. It may be possible for us to agree that by installing or erecting, a new product comes into being with a different name in the market from its components. However, as discussed the test of marketability is not satisfied. The product cannot be shifted without damage. Apart from that various items and components are embedded in the earth. The product,

therefore, is immovable. The order dated 15/1/2002 of Central Board of Excise & Customs, New Delhi itself regards items assembled and erected on the site and attached to the foundation on earth which cannot be dismantled without substantial damage to their components and thus, cannot be reassembled, as non excisable. The new product would not be considered as movable and, therefore, will not be an excisable good. Para 6 of the said circular will not apply to the facts of this case. In our opinion, therefore, though a new product comes into existence, yet as it is not movable, saleable and marketable, it would not be subject to excise duty.

10. The questions of law at D & E have to be answered in the affirmative and against the revenue. In view of this, the questions of law at A, B & C do not arise.

11. Appeal dismissed with no order as to costs.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)